



Law Society
of Scotland

Stage 1 Briefing

Heat Networks (Scotland) Bill

2 December 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Energy Law sub-committee previously responded to the Scottish Parliament's Economy, Energy and Fair Work Committee's Call for Evidence¹ on the Heat Networks (Scotland) Bill²(the Bill). The Committee published its Stage 1 Report on the Bill³ on 17 November 2020.

We have the following comments to put forward for consideration at the Stage 1 debate which is scheduled to take place on Thursday, 3 December 2020.⁴ Our comments consider:

1. Policy Objectives of the Bill
2. Use of Secondary Regulations
3. The Licensing Regime
4. Relationship with UK interests
5. Road work rights for licence holders

1. Policy Objectives

One of the main objectives of the Bill is to encourage the "greater deployment of heat networks in Scotland, in order to help reduce emissions from heating homes and buildings."⁵

¹ <https://www.lawscot.org.uk/media/368943/2020-06-01-heat-networks-s-bill-call-for-evidence.pdf>

² <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/heat-networks-scotland-bill/introduced/bill-as-introduced-heat-networks-scotland-bill.pdf>

³ <https://digitalpublications.parliament.scot/Committees/Report/EEFW/2020/11/17/Stage-1-Report-on-the-Heat-Networks--Scotland--Bill#Introduction>

⁴ <https://www.lawscot.org.uk/media/368943/2020-06-01-heat-networks-s-bill-call-for-evidence.pdf>

⁵ Paragraph 8 of the Bill's Policy Memorandum

830 heat networks are currently operating in Scotland. However, estimates suggest that only around 1% of Scotland's total heat demand (hot water and space heating) was met by these heat networks in 2018.⁶ It has been calculated that 6.7% of heat demand could come from heat networks by 2025 with long-term carbon savings could be around 23% by enacting the policy measures in the Bill.⁷ This highlights the opportunities which exist through use of heat networks.

This must be viewed in the light of the Climate Change (Emissions Reduction Targets) Act 2019 targets⁸ to reach net-zero greenhouse gas emissions by 2045. Awareness of climate change is increasing. The Scottish Government has already declared a climate emergency and the Just Transition Commission has made recommendations for "growing an inclusive, net-zero economy."

The objectives of the COP26 conference should also be emphasised which is due to be held in November 2021 in Glasgow. The UK in that context is committed to working with all countries and joining forces "on the frontline of climate change to inspire action ahead of COP26."⁹ This Bill is part of that vision.

As stressed, the operation of heat networks following the proposed Bill's implementation have "the potential to play a significant role in green recovery and a just transition."¹⁰

We would welcome the Scottish Government's announcement in producing further information as to the proposed timescales that it envisages regarding the roll out of the Bill's measures.¹¹

Regarding COP26 too, the Bill's Stage 1 Report¹² recognised that there was an opportunity to present a detailed policy case study on heat networks during the passage of the Bill. That could demonstrate relevant targets and initiatives and highlight local examples and practices. This would be interesting to understand and to allow the opportunities to be identified for Scotland in the light of the run up to COP26.

Importantly, the Bill also aims to regulate to provide minimum standards for technical requirements and regulatory oversight "to support, facilitate, and create controls"¹³ for heat networks. By providing for regulation, as the Bill outlines, this removes some potential barriers to competition and can avoid the opportunity for consumers to be vulnerable to abuse of the system and investors to risk.

⁶ Spice Briefing <https://sp-bpr-en-prod-cdnep.azureedge.net/published/2020/6/11/Heat-Networks--Scotland--Bill--republished-/SB%2020-41.pdf>

⁷ Paragraph 23 of the Stage 1 Report <https://digitalpublications.parliament.scot/Committees/Report/EEFW/2020/11/17/Stage-1-Report-on-the-Heat-Networks--Scotland--Bill#Introduction>

⁸ <http://www.legislation.gov.uk/asp/2019/15/enacted>

⁹ <https://www.gov.uk/government/topical-events/cop26>

¹⁰ Paragraph 15 of the Stage 1 Report <https://digitalpublications.parliament.scot/Committees/Report/EEFW/2020/11/17/Stage-1-Report-on-the-Heat-Networks--Scotland--Bill#Introduction>

¹¹ Paragraph 139 of the Stage 1 Report <https://digitalpublications.parliament.scot/Committees/Report/EEFW/2020/11/17/Stage-1-Report-on-the-Heat-Networks--Scotland--Bill#Introduction>

¹² Paragraph 140 of the Stage 1 Report <https://digitalpublications.parliament.scot/Committees/Report/EEFW/2020/11/17/Stage-1-Report-on-the-Heat-Networks--Scotland--Bill#Introduction>

¹³ Paragraph 2 of the Stage 1 Report <https://digitalpublications.parliament.scot/Committees/Report/EEFW/2020/11/17/Stage-1-Report-on-the-Heat-Networks--Scotland--Bill#Introduction>

Though the Bill relates to heat networks, inevitably it touches on a range of other policy interests which need to be factored in. These include renewables, energy efficiency, fuel poverty, land rights, planning permission, and climate change.¹⁴

It will be interesting to hear how to ensure the issue of fuel poverty is to be incorporated in the Bill.¹⁵

2. Use of Secondary Regulations

We recognise that the Bill is a technical bill; it provides a framework requiring much to be achieved by secondary legislation to be produced in due course. This affords much needed flexibility and for details to be worked out to respond to developing market developments.¹⁶

One positive example of that approach is provided at Part 1 of the Bill in dealing with licences. Section 1 of the Bill sets out a definition of a heat network, district network and communal heating system where powers are reserved for modification by regulations in due course.

This definition provides that necessary degree of flexibility to respond to future developments. We have confirmed that:

“secondary legislation [there] is probably the only way to retain the level of flexibility required to adapt quickly to future markets, given the constraints on parliamentary time.”¹⁷

However, we welcome the Scottish Government’s commitment to consult in advance of any changes which is required and appropriate.

However, there are sections of the Bill where regulations are to be laid that are merely to be subject to the negative parliamentary process.¹⁸ We have concerns that this does not afford the robustness required by parliamentary scrutiny. We have called previously¹⁹ for an outline content of a number of these regulations to be published as soon as possible so that they can be considered properly alongside the passage of the Bill. For example, it was widely assumed that licence standards may seek to codify the heat trust scheme rules and clarity on this would be welcome.

14 Paragraph 7 of the Stage 1 Report <https://digitalpublications.parliament.scot/Committees/Report/EEFW/2020/11/17/Stage-1-Report-on-the-Heat-Networks--Scotland--Bill#Introduction>

15 Paragraph 131 of the Stage 1 Report <https://digitalpublications.parliament.scot/Committees/Report/EEFW/2020/11/17/Stage-1-Report-on-the-Heat-Networks--Scotland--Bill#Introduction>

16 This is a “technical bill” with “substantial” delegated powers and confirmed that more detail would be provided via affirmative instruments to enable “appropriate consultation” with the Parliament and interested parties.

17 Law Society of Scotland Sarah Jane MacArthur Evidence Session quotes at paragraph 37 of the Stage 1 Report

18 Section 81(4) of the Bill

19 <https://www.lawscot.org.uk/media/368943/2020-06-01-heat-networks-s-bill-call-for-evidence.pdf>

3. The Licensing Regime²⁰

We support the Bill's intention to require that all heat networks operators in Scotland must hold a Heat Networks Licence.²¹ This will include those who currently operate existing heat networks, subject to any exemptions that may be granted by regulations or directions to be made later. This licensing approach seems appropriate in seeking to achieve the Bill's policy aims of regulating the heat sector.

However, there is a risk that there will be some existing heat networks where the current operator does not successfully obtain a licence and therefore will no longer be able to operate that network. That may have detrimental consequences for customers already being supplied by that network.

How is that risk is intended to be addressed?

We stated that mitigation was not addressed by the transfer scheme proposals as these networks may not have "listed assets" as defined under section 76 of the Bill as those "listed assets" are determined through the heat network consent process. Specific transitional arrangements are required to address this issue. We need to be confident since at this stage the Scottish Government has not been able to identify "a clear set of possible exemptions and the scope of any exemptions." We wish to keep this under review as the market develops.

We highlight the following concerns:

Given the inability to draw up comprehensive criteria for exemptions now, this is an example where the effective scrutiny of affirmative parliamentary making powers is required. We are also concerned to ensure proportionality, consistency and to take account of the developing nature of the market.

Section 3(3) of the Bill is too wide regarding the publication of directions particularly where this may include particular classes of operators.

An obligation for prior consultation with the relevant stakeholders is required and any publication of a direction should add a requirement for "reasonably."

Under section 14 of the Bill, there should also be consultation on any guidance to be issued and regarding information as to where.

How to respect consumer protection is a key requirement of the Bill. Exactly how this is to be developed to ensure connection where a heat supplier becomes insolvent which would leave them without a heat supply requires greater clarification.

²⁰ Section 4 of the Bill

²¹ Paragraph 19 of the Bill's Policy Memorandum

We are interested in the suggestion from Citizens Advice Scotland that the Bill should set out how best to protect and promote the interests of communities and consumers. We can see the benefit for this to be articulated clearly in a fashion that all consumer can understand.

4. Relationship with UK interests

Paragraph 28 of the Bill's Policy Memorandum referred to the UK Government responding to the Competition and Markets Authority's recommendations on heat networks. The UK consultation on Heat networks: Building a Market Framework" was undertaken at a similar time to the Bill's Call for Evidence. It covered broadly similar ground to the Bill recognising that "the devolved status of heat policy and heat network regulation in the UK is complex."

We welcome the view that Ofgem would be well suited to take on the role of regulation and await developments and an update from the UK Government on any legislation they intend to bring forward.

Clarification is needed as to the difference between licensing and regulation. We consider that the regulator is the person who issues licences, determines who can get one, and then monitors the conditions of those licences, so it may be largely related to terminology rather than functions.

Should the licensing authority be designated under section 4, and the enforcement authority designated under section 28, there is a need to include an appeals process.

Road work rights for licence holders

Paragraph 85 of the Bill's Policy Memorandum outlines an amendment to be brought forward during the passage of the Bill to provide licence holders with road work rights. Further engagement with the relevant roads stakeholders is required to ensure that provisions are compatible with the long-established governance processes regarding the access to roads required by utility providers. Sight of these provisions is required.



Law Society
of Scotland

For further information, please contact:

Gillian Mawdsley

Policy Executive

Law Society of Scotland

DD: 01314768206

gillianmawdsley@lawscot.org.uk